Supreme Court, U.S.
FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL H. WARMBRUN-PETITIONER

V.

DAVID SAMSON-RESPONDENT

Attorney General of New Jersey

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

APPENDIX MEMORANDUMS

OTHER ISSUES

Paul H. Warmbrun

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732-225-3546

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THE UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUT

SOIRICA, AMBRO and STAPLETON CIRCUT JUDGES

PAUL H. WARMBRUN v. DENNIS WERTZ et. al.

CA NO 00-2507 JAN 28, 2002

With respect to the photograph of the vehicle, the claim is without merit because there is no indication that the trial court excluded evidence, and Petitioner was able to cross-examine the state's witnesses and present his own witnesses in support of his theory. With respect to the video tape of the breathalyser tests and the blood samples, Petitioner has not demonstrated that the evidence was exculpatory, or that the police otherwise acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 56-57 (1988). We reject Petitioner's attempt to "cloak his Fourth Amendment claim in due process clothing" so as to circumvent Stone v. Powell, 428 U.S. 465 (1976). Gilmore v. Marks, 799 F.2d 51, 57 (3rd Cir. 1986).

We have also considered Petitioner's remaining arguments, and find them to be without merit and in need of no further discussion.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

WARMBRUN V. WERTZ, ET. AL.

CIX. ACTION NO. 96-1053 (SCL)

ENTERED APR 24, 2000

LIFLAND DISTRICT JUDGE

BACKGROUND

On July 27, 1992, a jury in the New Jersey Superior Court, Middlesex County, convicted petitioner of one count of reckless manslaughter, N.J.S.A. 2CL:11-4(b)(1), driving under the influence of alcohol, leaving the scene of an accident, and refusing to take a breathalyser test. On the manslaughter count, the trial judge sentenced petitioner to ten years in prison with three years of parole ineligibility. The court also imposed a $30 penalty in favor of the Violent Crime Compensation Board, fined him $1,000, and revoked his driving privileges for two years following release from prison. On the other counts, the judge fined petitioner a total of $850 and added an aggregate 18-month driver's licence suspension to the two years already imposed.

Petitioner appealed the other convictions on December 12,

1992. On November 1 1994, the New Jersey Superior Court, Appellate Division, affirmed the conviction. Warmbrun then petitioned for certification to the New Jersey Supreme Court, which was denied on March 14, 1995.

On April 18, 1995, Warmbrun filed a petition for post-conviction relief with the Superior Court of New Jersey. The court denied the petition. Petitioner did not appeal to the Appellate Division or petition for certification to the New Jersey Supreme Court.

On March 1,1996, petitioner filed a petition of habeas corpus relief[1] in this Court persuant to 28 U.S.C. § 2254, asserting that he was "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence." Specifically, petitioner asserts that: (1) the trial judge's charge of "flight" violated petitioner's Fifth Amendment right to be tried only on those offenses presented in his indictment; (2) the "flight" jury charge was tantamount to an unconstitutional mandatory presumption; (3) the judge's definition of circumstantial evidence was an unconstitutional mandatory presumption; (4) the East Windsor police violated his Sixth Amendment rights by moving and damaging his car, then taking photographs that were later admitted into evidence; (5) the East

Windsor police violated petitioner's due process rights by destroying a videotape and blood samples; (6) the court violated the Fourth Amendment and due process by admitting a second set of blood samples; and (7) the court erred by admitting vehicle photographs and parts into evidence.

On July 30, 1996, this Court held that petitioner failed to exhaust his claims in state court and was procedurally barred from doing so.[2] Consequently, this Court ordered petitioner to Division or petition for certification to the New Jersey Supreme Court.

On March 1,1996, petitioner filed a petition of habeas corpus relief[1] in this Court persuant to 28 U.S.C. § 2254, asserting that he was "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence." Specifically, petitioner asserts that: (1) the trial judge's charge of "flight" violated petitioner's Fifth Amendment right to be tried only on those offenses presented in his indictment; (2) the "flight" jury charge was tantamount to an unconstitutional mandatory presumption; (3) the judge's definition of circumstantial evidence was an unconstitutional mandatory presumption; (4) the East Windsor police violated his Sixth Amendment rights by moving and damaging his car, then taking

photographs that were later admitted into evidence; (5) the East Windsor police violated petitioner's due process rights by destroying a videotape and blood samples; (6) the court violated the Fourth Amendment and due process by admitting a second set of blood samples; and (7) the court erred by admitting vehicle photographs and parts into evidence.

On July 30, 1996, this Court held that petitioner failed to exhaust his claims in state court and was procedurally barred from doing so.[2] Consequently, this Court ordered petitioner to provide it with a written reason why he did not appeal the denial of his petition for state post-conviction relief and how he was prejudiced by the alleged infringements of his constitutional rights. After petitioner failed to show adequate cause or prejudice demonstrative of a fundamental miscarriage of justice, this Court denied Warmbrun's petition in a memorandum and order date July 24, 1997.

Petitioner appealed to the Court of Appeals for the Third Circuit. In an order dated January 16, 1998, the Court of Appeals found petitioner's claim that he was "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence" to be exhausted. Moreover, the Third Circuit found the claim to be barred by Stone v. Powell, 428 U.S. 465 (1976), to the extent that "illegal

evidence" refers to the results of the blood test allegedly drawn in violation of petitioner's Fourth Amendment rights.

On May 3, 1999, this Court held a hearing to clarify petitioner's intentions. As a result of that hearing, petitioner was informed that two claims, (1) that the trial judge's charge of "flight" violated petitioner's Fifth Amendment right to be tried only on those offenses presented in his indictment (ground one of the instant petition) and (2) that the "flight" jury charge was tantamount to an unconstitutional mandatory presumption (ground two of the instant petition), were not fairly presented in the state courts and therefore were unexhausted. Faced with the choice between pursuing a nunc pro tunc appeal of the denial of his post-conviction petition, 3 and waiving his first two arguments so that he may proceed in the instant petition, petitioner chose to abandon those claims.

However in a letter dated May 4, 1999, petitioner, claiming to have been unprepared for the previous day's hearing, sought to reinstate the two claims. The Court agreed to allow him to do so. Thus presented with a mixed habeas corpus petition asserting both exhausted and unexhausted claims, the Court dismissed the entire petition without prejudice.

Realizing the effects of his decision, petitioner made a

motion for reconsideration, once again asking the court to allow him to drop the unexhausted claims from his petition. In the interest of justice, and pursuant to its discretionary power under Rule 60(b), this Court granted petitioner's motion and allowed him to proceed with his petition. Now, this Court will consider the merits of the original habeas corpus petition.

DISCUSSION[4]

In a recent letter to the Court, petitioner contends that although he has been released from custody, the Court must still consider the habeas corpus petition because the criminal conviction denies him three years of Social Security retirement income and the opportunity to gain-part time employment with a major corporation. In his original application for habeas review, petitioner claims that: (1) The trial court violated the Fourteenth Amendment due process clause because its jury instruction concerning the weight of circumstantial evidence constituted a mandatory presumption (ground three of the instant petition); (2) The police violated the Sixth Amendment confrontation and compulsory process clauses when they moved petitioner's car, damaging it in the process, before taking evidentiary photographs that could have been used in petitioner's

defense (ground four of the instant petition); (3) The police violated the Fourteenth Amendment due process clause when they destroyed untested blood samples and a videotape of petitioner's breathalyser test that could have exonerated petitioner (ground five of the instant petition); (4) The trial court erred in allowing into evidence results of a blood test that was taken in violation of Fourteenth Amendment due process and the Fourth Amendment ban on unreasonable searches and seizures (ground six of the instant petition); and (5) the trial court erred in allowing into evidence parts and photographs of petitioner's automobile that were seized in violation of the Fourth Amendment (ground seven of the instant petition). Petitioner further claims that the cumulative effect of these claims resulted in his being "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence."

1) Custody Requirement

While custody is a major requirement when initially filing a habeas corpus petition, the Supreme Court has made it clear that once federal jurisdiction attaches in the district court, it is not defeated by the release of petitioner form custody prior to completion of the proceedings provided that there are some collateral consequences

that arise from the conviction. See Carafas v. Vallee. 391 U.S. 234, 237-39 (1968). The Court clarified that holding by "acknowledging the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Sibron v. State, 392 U.S. 40, 55 (1968). With this opinion in mind, federal courts are reluctant to find that a petition for habeas review of a criminal conviction filed before a prisoner's release is barred because collateral consequences do not exist. See Wood v. Hall, 130 F.3d 373, 376 (9th Cir. 1997) (irrebuttable presumption of collateral consequences exists when a petitioner is convicted of a criminal offense); Nakell v Attorney General of North Carolina, 15 F.3d 319, 322 (4th Cir. 1994) (possible refund of fine imposed as a consequence of contempt conviction is enough to preclude mootness of a case).

Here, petitioner contends that being denied three years of Social Security income and being barred from part-time job shop employment within a major corporation constitute collateral consequences in the spirit of Carafas. A manslaughter conviction would place limitations on Social Security payments. See 42 U.S.C. § 402(x). Petitioner, however, neglects to include any documentation that he was denied these payments. Nor has petitioner included any evidence that he would be denied the

employment he seeks. Nevertheless, this Court believes that inherently present in a manslaughter conviction , even after a full service of a probationary term, are consequences which restrict freedom and hinder certain aspects of life. Under New Jersey law, a manslaughter conviction carries with it considerable weight when determining the sentencing for subsequent crimes. See N.J.S.A. 2C:44-1(6) (aggravating factors in sentencing). In addition, such a conviction can be introduced as relevant evidence in determining any issue or impeaching the convicted person as a witness. See N.J.S.A. 2C:51-1b. Less relevant in the present case, a manslaughter conviction precludes a person from receiving a casino licence in New Jersey. See N.J.S.A. 5:12-86. Thus, taking into account the fact that this petition was filed in 1996 and that there appear to be several consequences that could befall petitioner because of his conviction, this Court will reach the merits of the petition regardless of the fact that petitioner is no longer incarcerated.

2) The Merits

The standard of review set forth in 28 U.S.C. § 2254 is explicit. See Wainright v. Goode, 464 U.S. 78, 84 (1983). "A federally issued writ of habeas corpus . . . reaches only convictions

obtained in violation of some provision of the United States Constitution." See Smith v. Phillips, 455 U.S. 209, 221 (1982). Moreover, a federal court cannot overturn a state court conviction simply because it is erroneous, undesirable, or "universally condemned;" rather, it must violate some right that is guaranteed by the Fourteenth Amendment. See id. The Supreme Court has specifically addressed Fourth Amendment claims contained in a habeas petition, holding that if the state provided an opportunity for full and fair litigation of the claim in its own courts, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial. See Stone v. Powell, 428 U.S. 465, 494 (1976).

Here, a few of petitioner's claims must suffer immediate dismissal. This Court is precluded from addressing whether the trial court erred in allowing the admittance of illegally seized automobile parts and photographs (ground seven of the instant petition) because that claim is entirely predicated on the Fourth Amendment and was fully addressed by the state courts. See id. Likewise, insofar as petitioner's claim that blood tests he was administered violated the Fourth Amendment (ground six of the instant petition), this Court cannot address that claim. See id.

The rest of petitioner's claims, while addressable by this court, are merit less. Petitioner claims that the prosecutor's remark in court, that the radiator grille pieces found at the scene of the accident were from petitioner's vehicle, in combination with the judge's jury instructions concerning circumstantial evidence, created a mandatory presumption that the evidence in question came from only one source. (ground three of the instant petition). This presumption, petitioner contends, violated due process by switching the burden of persuasion concerning the source of the evidence from the prosecution to the defense. To support his contention, petitioner cites Franklin v. Francis, 471 U.S. 307 (1984).

In Franklin, the contested jury instruction had to do with the crucial element of intent in a murder case. See id. at 315. The instruction directly counseled the jurors to believe that because defendant acted the way he did, any consequence of that action was intended. See id. This instruction proved an element of the crime and thereby lifted the burden of persuasion from the prosecution. See id. Moreover, the Court has held that a jury instruction cannot be read in "artificial isolation," but must be considered in the context of the instruction as a whole. See Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

Here, petitioner's situation differs greatly from that in Franklin. The instruction by itself did not prove an element of the crime in question. The judge was instructing the jury on how to perceive circumstantial evidence. The instructions concerning a juror's use of circumstantial evidence, while important, did not prove an element of the prosecution's case. Furthermore, the judge emphasized the heavy burden that rests on the prosecution in criminal trials. Additionally, the judge counseled the jurors that if circumstantial evidence raises a reasonable doubt as to petitioner's guilt, that evidence can be used to find him not guilty. Therefore, the instructions as a whole do not rise to the level envisioned by the Court in Franklin.

Next, petitioner contends that his Sixth Amendment confrontation and compulsory process rights were violated when the court allowed into evidence photos that were taken after police officers allegedly moved his vehicle and damaged it in the process. (ground four of the instant petition). He further claims that he was not afforded the right to confront the officers who damaged his car. Defendant's right to present relevant evidence is not unlimited but rather is subject to reasonable restrictions. See United States v. Scheffer, 118 S. Ct. 1261, 1264 (1998). A defendant's interest in

presenting such evidence may thus bow to accommodate other legitimate interests in trial process. See id. Furthermore, the Sixth Amendment does not afford criminal defendants a guarantee that all witnesses they wish to call during their trial will be compelled to testify. See United States v. Valenzuelaa-Bernal, 458 U.S. 858, 967 (1982). It simply guarantees that defendants will be afforded a process by which they will be able to call witnesses in a n effort to prove their case. See id. If not given this opportunity, a defendant must make a plausible showing of how the excluded testimony would have been both material and favorable to his defense. See id.

Here, petitioner's claims are unsubstantiated. Police Officers Joseph Battaglia and James Bramble, from the North Brunswick Police Department, and Investigator Kenneth Mazza, from the Middlesex County Prosecutor's Office, testified at trial as to the condition of the car before photographs were taken. (State Ex. A-11). Petitioner had the opportunity to cross-examine each officer at trial. He was also given the opportunity to call his own witnesses to substantiate this claim that evidence was tampered with. There was no Sixth Amendment violation during petitioner's trial.

Petitioner further contends that the police destruction of videotape evidence and blood samples violated due process. (ground

five of the instant appeal). The fundamental fairness requirement of the Fourteenth Amendment due process clause does not impose on police an absolute duty to preserve all materials that may be of some evidentiary significance in the course of a criminal trial. See Arizona v. Youngblood, 488 U.S. 51, 58 (1989). Unless a defendant can show bad faith, failure to preserve evidence does not constitute a denial of due process. See id. Bad faith, in this situation, turns on whether the police knew the exculpatory value of the evidence at the time it was lost or destroyed. See id. at 56 n.4. In Youngblood, due to police negligence, blood and semen samples taken from a sexual assault victim were destroyed before standard testing could be done. See Youngblood, 488 U.S. at 57. The Court ruled that due process did not require the police to preserve the samples even if they would be useful to the defendant. See id.

Here, petitioner has failed to show that there was any bad faith on the part of the police when they destroyed the videotape. In light of Youngblood, due process was not violated by the destruction of a videotape or additional blood samples. Furthermore, petitioner's contention that Brady v. Maryland, 373 U.S. 83 (1963), is dispositive has no merit because Youngblood is a more recent decision whose facts are analogous to the present case.

Petitioner's final claim is that due process was violated when he was forced to submit to a blood test. (ground six of the instant appeal). The Supreme Court directly addressed this question in Schmerber v. California, 384 U.S. 757 (1966). The Court held that a physician's withdrawal, at the direction of a police officer, of a blood sample from the body of a person accused of driving while intoxicated, and the subsequent admission of that blood analysis into evidence, did not deny the accused due process of law under the Fourteenth Amendment. See id. at 759-60. Thus, petitioner's due process claim is without merit.

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[1]Claims 8 and 9 were abandoned in a petitioner in a letter to this Court dated April 25, 1999

[2]See Rule 2:4-1(a) which provides, "Appeals from final judgments of courts, final judgments or orders of judges sitting as statutory agents and final judgments of the Division of Workers' Compensation shall be taken within 45 days of their entry."

[3]The state agreed not to oppose petitioner's efforts to persue a nunc pro tunc appeal of the denial of post conviction relief in state court.

[4]Persuant to the Supreme Court's decision in Lindh v. Murphy, 521 U.S. 320 (1997), holding that the amendments altering habeas corpus procedures contained in the Antiterrorism and Effective Death Penalty Act (AEDPA) do not apply to habeas petitions that were initially filed before its enactment, this Court will decide the issues in this petition without regard to the AEDPA.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

WARMBRUN V. WERTZ, ET. AL.

CIX. ACTION NO. 96-1053 (SCL)

ENTERED JULY 25, 2000

LIFLAND DISTRICT JUDGE

BACKGROUND

On July 27, 1992, a jury in the New Jersey Superior Court, Middlesex County, convicted Petitioner of one count of reckless manslaughter, N.J.S.A. 2C:11-4(b)(1), driving under the influence of alcohol, leaving the scene of an accident, and refusing to take a breathalyzer test. Petitioner did not appeal the convictions for motor vehicle offenses or the sentences imposed.

Petitioner appealed the other convictions on December 12, 1992. On November 1, 1994, the New Jersey Superior Court, Appellate Division, affirmed the convictions. Warmbrun then petitioned for certification to the New Jersey Supreme Court, which was denied on March 14, 1995.

On April 18, 1995, Warmbrun filed a petition for post-conviction relief with the Superior Court of New Jersey. The court denied the

petition. Petitioner did not appeal to the Appellate Division or petition for certification to the New Jersey Supreme Court.

On March 1, 1996, Petitioner filed a petition for habeas corpus relief in this Court pursuant to 28 U.S.C. § 2254. On July 30, 1996, this Court held that Petitioner failed to exhaust his claims in state court and denied Warmbrun's petition by Memorandum and Order.

Petitioner appealed to the Court of Appeals. In an Order dated January 6, 1998, the Court of Appeals found Petitioner's claim that he was "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence" to be exhausted. Moreover, the Court of Appeals found the claim to be barred by Stone v. Powell, 428 U.S. 465 (1976), to the extent that "illegal evidence" refers to the results of the blood test allegedly drawn in violation of Petitioner's Fourth Amendment rights. The Court of Appeals ruled that Petitioner bore the burden of showing on remand that his claim was not barred by Stone v. Powell.

On May 3, 1999, this Court held a hearing to clarify Petitioner's intentions. As a result of the hearing, Petitioner was informed that two claims, (1) that the trial judge's charge of "flight" violated Petitioner's Fifth Amendment right to be tried only on those offenses presented in his indictment and (2) that the "flight" jury charge was

tantamount to an unconstitutional mandatory presumption, were not fairly presented in the state courts and therefore were unexhausted. Faced with the choice between pursuing a nunc pro tunc appeal of the denial of his post-conviction petition,1 and waiving the above unexhausted claims so that he may proceed on the instant petition, Petitioner chose to waive those claims.

However, in a letter dated May 4, 1999, Petitioner, claiming to have been unprepared for the previous day's hearing, sought to reinstate the two claims. The Court agreed to allow him to do so. Thus presented with a mixed habeas corpus petition asserting both exhausted and unexhausted claims, the Court dismissed the entire petition without prejudice.

Realizing the effect of his decision, Petitioner made a motion for reconsideration, once again asking the Court to allow him to drop the unexhausted claims from his petition. In the interest of justice, and pursuant to its discretionary power under Rule 60(b), this Court granted Petitioner's motion and allowed him to proceed with his petition. The Court considered the merits of the original habeas corpus petition and denied relief by memorandum and order filed on April 24, 2000. On May 12, 2000, Petitioner filed a motion for reconsideration fo the April 24, 2000 Order.

STANDARD OF REVIEW

Relief by way of a motion for reconsideration is "an extraordinary remedy" that is to be granted "very sparingly." See NL Indus. Inc. v. Commercial Union Ins. Co., 935 F. Supp. 513, 516 (D.N.J. 1996); Maldonado v. Lucca, 636 F. Supp. 621, 630 (D.N.J. 1986). Local Rule 7.1(g) governing reconsideration does not contemplate a recapitulation of arguments already considered by the court. See Bermingham v. Sony Corp of Am., Inc., 820 F. Supp. 834, 856 (D.N.J. 1992), aff'd, 37 F.3d 1485 (3d Cir. 1994). Local Rule 7.1(g) requires the moving party to "set[] forth concisely the matters or controlling decisions which counsel believes the [court] has overlooked." L. Civ. R. 7.1(g); Resorts Int'l v. Great Bay Hotel and Casino, 830 F. Supp. 826, 831 (D.N.J. 1992). A motion under Rule 7.1(g) may be granted on one of three grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; [or] (3) the need to correct a clear [of law] or prevent manifest injustice." North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995).

DISCUSSION[2]

Petitioner asserts that the Court in its April 24, 2000 dismissal, overlooked: (1) "the illegal indictment," (2) "jurisdiction," (3) that

"the illegal blood samples are not Fourth Amendment evidence and cannot be barred by Stone v. Powell, [428 U.S. 465 (1976)],"(4) that "the testimony and photographs of Mazza and Battaglia were the result fo the Sixth Amendment violation and not proof that there was no violation," (5) that "Arizona v. Youngblood, [488 U.S. 51 (1989)] is not applicable to [his] case," and (6) "the unique status of blood samples and the cross examination of Officer Bramble."

1) The Indictment

At issue is whether or not this Court overlooked Petitioner's claim of an "illegal indictment" in the April 24, 2000 Order denying habeas relief. While consideration of the "illegal indictment" was not articulated in that Order, the issue has been extensively considered by this Court; in its first opinion on July 24, 1997, on remand from the Court of Appeals, in a hearing with direct testimony from Petitioner on May 3, 1999 (where the Petitioner himself defined the limits of his "illegal indictment" claim). In a second habeas opinion, filed August 10, 1999, and in a motion for reconsideration, granted September 9, 1999. In the following, the Court will discuss first, what the "illegal indictment" claim represents as defined by Petitioner at the May 3, 19999 hearing, second, why the "illegal indictment" claim is unexhausted, and third, why no articulated consideration of the

"illegal indictment" issue was necessary in the April 24, 2000 Order, specifically because the Petitioner voluntarily dropped the claim.

a) Petitioner Defines the "Illegal Indictment" Claim

The Court of Appeals indicated that it believed the "illegal indictment" claim was predicated on the "illegal evidence [the blood samples]" claim, and that Petitioner must show that the claim was not barred by Stone v. Powell. See Warbrun v. Wertz, etc., et al., No. 96 Civ. 1053 (D.N.J. Jan. 16, 1998). Upon remand from the Court of Appeals, this Court sought to ascertain the meaning of Petitioner's understanding of the "illegal indictment" claim. Petitioner sent the Court a letter, dated April 25, 1999, in which he detailed the grounds of his claim. The grounds expressed in the letter differed from the grounds as they appeared in his original habeas petition filed March 1, 1996, to the extent that Grounds 1 and 2 were associated with the "illegal indictment" claim ("Ground 1,2 An illegal indictment was clearly understood and specifically mentioned in the Appellate opinion").

In this letter, Petitioner asserted for the first time that his claim of an "illegal indictment" was based on Grounds 1) that "the trial judge's charge of 'flight' violated petitioner's Fifth Amendment right to be tried only on those offenses presented in his indictment" and 2) that,

"the 'flight' charge was tantamount to an unconstitutional mandatory presumption." Both Grounds 1 and 2 specifically address the issue of the trial judge's jury charge of "flight." This April 25, 1999, letter, associating the "illegal indictment" claim with the "flight" charge, represented a novel position by the Petitioner. Because of this novel position, the Court conducted a hearing to ensure that both parties and the Court understood exactly what Petitioner's claims represented and upon which grounds they stood.

At the May 3, 1999 hearing the Court concluded (a) that Petitioner predicated his claim of an "illegal indictment" solely on the trial judge's jury charge fo "flight", (b) that such an "illegal indictment"claim, predicated on the "flight" charge, was never presented to the state courts, and (c) that the Court of Appeals in its determination that the "illegal indictment" claim was exhausted at the state level did not know that Petitioner asserted the "illegal indictment" claim based on the "flight" charge but rather, presumed it was based on the "illegal evidence" claim.

At the hearing on May 3, 1999, the Court was finally able to ascertain from Petitioner exactly what he understood his claim of the "illegal indictment" to represent, as evidenced by the following colloquy:

> THE COURT: In this habeas you are making a claim that the trial judge's charge of flight violated your Fifth Amendment right to be tried only on those offenses presented in your indictment.
> MR. WARMBRUN: Yes, Sir.
> THE COURT: Mr. Zwillman [Prosecutor] tells me, and I think he is correct, that the claim was never presented to the New Jersey state courts.
> MR. WARMBRUN: Of course it was. It clearly states on there, there was an illegal indictment. It was. The illegal indictment is the issue. What more can you say about it?
> THE COURT: Well, the illegal indictment is one thing. A charge of flight in the trial judge's charge to the jury is quite another thing.
> MR. WARMBRUN: Well, the charge of flight is what makes the indictment illegal, your Honor.

(Tr. at 13-14). The transcript thus reveals that Petitioner predicated his claim of the "illegal indictment" on the trial judge's jury charge of "flight," and not on the introduction of the blood sample results.

b) The "Illegal Indictment" Claim Predicated on "Flight" was Never Presented to the State Courts

Although Petitioner asserts in the above-mentioned excerpt that he did present his "illegal indictment" claim at the state level, analysis of the record reveals that Petitioner never predicated the "illegal indictment" claim on the "flight" charge prior to the April 25, 1999, letter. Previous to this letter, and the subsequent May 3, 1999, hearing, Petitioner merely stated that the indictment was illegal; he never specified what about the indictment he considered to be the basis of illegality. The Court evaluated the Appellate Division

opinion and found no reference to Ground 1 and the "flight" charge:

> THE COURT: Was [the flight charge] presented to the Appellate Division?
> MR. ZWILLMAN: No, not as far as I know . . .
> THE COURT: I am looking at your pro se supplemental brief, Mr. Warmbrun.
> MR. WARMBRUN: Yes, it says in the beginning that I was illegally convicted of an illegal indictment.
> THE COURT: Where is there a reference to flight?
> MR. WARMBRUN: I didn't mention flight specifically.
> THE COURT: Well, then how is the Appellate Division supposed to know that is what you are talking about?
> MR. WARMBRUN: The issue is it is an illegal indictment. I mean, what else can make an indictment illegal? Somebody has got to be charged with something that didn't come from the indictment.
> THE COURT: All right.

(Tr. at 19-20). The Court then continued to determine if Ground 2 had ever been presented to the Appellate Division:

> THE COURT: The next item that I cannot find any reference to is the fact that the trial judge charged about flight and you said that was tantamount to an unconstitutional mandatory presumption.
> MR. WARMBRUN: Yes.
> THE COURT: Can you tell me where you presented that to the state court in those words?
> MR. WARMBRUN: Well, I didn't. I mean the issue was an illegal indictment. You raise the issue. It doesn't say you have to explain the whole thing because it certainly, if the apppellate court looks at it they find out, well, the indictment is illegal, why is it illegal. That is what they are supposed to review, they look at it and they see that the Judge charged this is the charge, you don't find out the whole thing and tell it to the court. They look at it themselves.
> THE COURT: Okay. I am satisfied that claim is not

exhausted as well, and will be dismissed.

(Tr. at 20-21). The record reveals that Petitioner never mentioned to the Appellate Division the basis of his "illegal indictment" claim at all:

> THE COURT: Did you tell the Appellate Court about why you think it is illegal?
> MR. WARMBRUN: No. I said it was illegal.
> THE COURT: I am sorry Mr. Warmbrun. The legal doctrine is you must fairly present the challenge, and the basis for the challenge is that – what you have told me today. I have no indication that the Appellate Division ever understood what your argument was.

(Tr. at 30). Because Petitioner never fairly presented the challenge at the state level, the Court determined that Petitioner's claim was unexhausted. See 28 U.S.C. § 2254(b); see also O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Furthermore, "the burden of establishing that such claims were fairly presented falls upon the petitioner." Lines v. Larkin, 208 F. 3d 153, 159 (3d Cir. 2000) (citing Lambert v. Blackwell, 134 F. 3d 506, 513 (3d Cir 1997)). Petitioner failed to meet this burden at the hearing

The Court of Appeals makes no reference to the charge of "flight" in the Order issued on January 16, 1999. The Court of Appeals states, "Petitioner is entitled to pursue this claim now provided he can demonstrate to the district court's satisfaction that his claim is indeed embodied in the present habeas petition and is not barred by Stone v.

Powell." Slip op. at 1. The hearing transcript reveals that Petitioner did not satisfy the Court that his claim, "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence," was completely embodied in his original habeas petition. Likewise, the Court of Appeals made its determination that the claim was exhausted without any knowledge that Petitioner predicated the "illegal indictment" portion of the claim on the "flight" charge, as evidenced by the following:

(Tr. at 26-27). Since the "flight" charge was never "fairly presented" to the state courts, and it served as the basis of the "illegal indictment" claim, the Court was not satisfied that the "illegal indictment" issue predicated on the "flight" charge to the Court of Appeals. Therefore, at the May 3, 1999 hearing, this Court determined that the "illegal indictment" claim was unexhausted.

c) The Absence of an Articulated Consideration of the "Illegal Indictment" Claim

In reversing this Court's July 30, 1996 Order dismissing the Petitioner's habeas petition, the Court of Appeals stated, that "[if] petitioner cannot satisfy the district court that the 'illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence' claim is embodied in the present habeas petition, then the

district court shall dismiss the petition for failure to exhaust state remedies." Warmbrun v. Wertz, etc., al., No. 96 Civ. 1053 (D.N.J. Jan 16, 1998).

At the May 3 hearing, this Court specifically enumerated and sought to comprehend fully each point raised by Petitioner. The Court repeatedly requested that Petitioner specify precisely what he proposed to be his claim of the "illegal indictment" in order to determine whether or not the claim was exhausted at the state level. The Court took pains to explain to Petitioner that, "the indictment has to stand or fall on what happens before the indictment is presented to the grand jury," and that the charge of flight to the jury is a completely separate claim. (Tr. at 14). The transcript reveals that Petitioner had never previously defined his illegal indictment claim as predicated on the charge of flight prior to the May 3, 1999 hearing.

Since the issue of flight was never fairly presented on the state level, the Court informed Petitioner that his petition would be dismissed without prejudice because it contained unexhausted claims, as required by Rose v. Lundy, 455 U.S. 509, 510 (1982). Petitioner then elected to drop Grounds 1 and 2. (Tr. at 34). The Court again took great pains to ensure that Petitioner understood that by dropping Grounds 1 and 2, and proceeding with his amended

habeas petition, he was barred from raising these issues in this Court again. (Id. at 36). Petitioner stated, "I understand that, Judge." (Id.).

The following day, May 4, 1999, the Petitioner argued that he was unprepared at the hearing the previous day and requested that Grounds 1 and 2 be reinstated. The Court complied. In accord with Rose v. Lundy, on August 10 1999, the Court issued a Memorandum and Order denying the petition because it contained both exhausted and unexhausted claims.

Petitioner then filed a motion to reconsider on August 19, 1999, once again requesting that Grounds 1 and 2 be dropped from the petition. The Court complied, and granted the motion for reconsideration, by Order filed on September 2, 1999. On April 24, 2000, the Court denied the petition as it now stood, based on Grounds 3 through 7. Thus, Petitioner has twice dropped these two unexhausted grounds serving as the basis of the "illegal indictment" claim.

In this motion for reconsideration, Petitioner is reiterating the claim of the "illegal indictment" once again. As stated above, Petitioner himself has voluntarily dropped Grounds 1 and 2, upon which the "illegal indictment" claim was predicated. Although the Court attempted to point out the difference between an illegal

indictment and a jury charge, Petitioner insists that the Court has overlooked the issue of the illegal indictment; he does not understand the legal distinction between the two claims, and conflates two distinct areas of law. To the extent that the issue of the "illegal indictment" was not discussed in the April 24, 2000 Order, that is not because it was overlooked by the Court. Rather, it was determined to be unexhausted at the prior hearing and was voluntarily dropped by the Petitioner. The Court need not reconsider an issue voluntarily dropped by the Petitioner.

2) Jurisdiction

Petitioner does not specify what he proposes when he states that the Court has failed to consider jurisdiction. However, the trial court had jurisdiction because the indictment was probable cause to prosecute." Rose v. Bartle, 871 F.2d 331, 353 (1989); see also Rivera v. Government of Virgin Islands, 375 F.2d 988, 990 (3d Cir. 1967). The Court did not overlook this issue of jurisdiction, rather the question did not warrant discussion.

3) The Blood Samples

The Court of Appeals stated that Petitioner must show that the blood samples taken by the police were not barred by Stone. Petitioner erroneously relies on Schmerber v. California, 384 U.S.

757, 761 (1966), arguing that since the blood samples were "neither [his] testimony nor evidence . . .[but rather] stolen property" (Pl's. Br. at 3) that they violated the Fifth Amendment and not the Fourth. Petitioner is mistaken in his interpretation of the law. "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." Schmerber, 384 U.S. at 765. Schmerber stands for the principle that compulsory blood tests are not testimonial evidence and do not constitute a Fifth Amendment violation, since they are distinguishable from compulsory physical evidence that functions as a "communication." Schmerber, 384 U.S. at 763-64; cf. Boyd v. United States, 116 U.S. 616 (1886). Petitioner's claim that the blood samples were illegally obtained was not overlooked by this Court. Petitioner's reliance on Schmerber is misplaced.

4) The Testimony and Photographs of Mazza and Battaglia

Petitioner raises for reconsideration a claim previously addressed by the Court in the Memorandum and Order issued April 24, 2000. Petitioner asserts that the Court overlooked Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) (where defendant's full and

fair opportunity to present a defense was violated when the circumstances surrounding his confession were excluded from the trial). In Crane, the defendant was precluded from introducing evidence to defeat the credibility of the voluntariness of his confession. The Supreme Court held that such an evidentiary ruling "deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." Crane, 476 U.S. at 687. Crane is distinguishable from the instant case. Petitioner has had a full and fair opportunity to "present a defense." That he disagrees with the jury as to the credibility and accuracy of the testimony of Officer Battaglia and Inspector Mazza is not a constitutional violation. Petitioner's reliance on Crane in seeking reconsideration is misplaced.

5) Arizona v. Youngblood

Petitioner contends that Youngblood is not applicable to his case. In Youngblood, due to police negligence, blood and semen samples taken from a sexual assault victim were destroyed before standard testing could be accomplished. See Youngblood, 488 U.S. at 57. The Court ruled that due process did not require the police to preserve the samples even if they would be useful to the defendant. See id. Absent a showing of bad faith on the part of the police, the due

process rights of the Petitioner were not violated by the discarded blood samples. See Griffin v. Spratt, 969 F.2d 16, 17-18 (3d Cir. 1992) (applying Youngblood). This Court need not reconsider an issue previously addressed in the original petition. See Bermingham, 820 F. Supp. at 856 (stating that a motion for reconsideration is not a vehicle to disagree with the court's decision, and recapitulation of the previous arguments does not satisfy the moving party's burden).

6) The Status of Blood Samples and the Cross Examination of Officer Bramble

This claim has been adequately addressed in the April 24, 2000 Order, and the Court need not revisit it. The cases cited by Petitioner - Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) (where the prosecutor *knowingly* introduced false evidence), Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992) (holding that the state must turn over to the defendant an exculpatory semen sample *if* in fact existed, but limiting the holding to the habeas preceding only and not to the state's past duty to present exculpatory evidence at the trial), and United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992) (where a materially exculpatory psychiatric report, favorable to the defendant, was withheld by the prosecution) – are neither controlling nor on point. In all three cases, the material value of the exculpatory evidence was not in dispute. In the instant case, the

exculpatory value of the lost blood samples was never determined since the samples were never tested. Although Petitioner asserts that the lost blood samples might have exculpatory value, he never asserts that they actually were tested and that the exculpatory test results were knowingly discarded by the police. Furthermore, Petitioner had ample opportunity to cross examine Officer Bramble. A habeas corpus petition is not the proper forum for Petitioner to voice his disagreement with the jury's determination. Therefore, Petitioner's claim that the Court overlooked the "unique status of the blood samples and Officer Bramble's testimony" lacks merit.

7) Conclusion

By Order filed August 10, 1999, this Court found Petitioner's claim that he was "illegally convicted of an illegal indictment, conceived and prosecuted with illegal evidence" to be an unexhausted claim, because it was *not* embodied in the original habeas petition. The Court made this determination based on the April 20, 1999, letter and the May 3, 1999, hearing where Petitioner himself defined the "illegal indictment" claim. The "illegal indictment" claim as defined by Petitioner is contrary to the Court of Appeals' understanding, as well as this Court's previous understanding of the "illegal indictment" issue. The claim as argued

by Petitioner in this motion for reconsideration is an unexhausted claim. As such, reconsideration of the denial of Warmbrun's habeas corpus petition is not warranted. Petitioner's additional arguments also are meritless and do not warrant reconsideration of the petition.

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[1]The state agreed not to oppose Petitioner's efforts to pursue nunc pro tunc appeal of the denial of post-conviction relief in state court.

[2]Persuant to the Supreme Court's decision in Lindh v. Murphy, 521 U.S. 320 (1997), holding that the amendments altering habeas corpus procedures contained in the Antiterrorism and Effective Death Penalty Act (AEDPA) do not apply to habeas petitions that were initially filed before its enactment, this Court will decide the issues in this petition without regard to the AEDPA.

Supreme Court, U.S.
FILED

02 344 JUN 3 2002

OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL H. WARMBRUN-PETITIONER

V.

DAVID SAMSON-RESPONDENT

Attorney General of New Jersey

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TYPOGRAPHICAL CORRECTION

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BEST AVAILABLE COPY

Petition for a Writ of Certiorari

Case Page 4

Line 7-8 Should Correctly Read

"I was illegally convicted of an illegal indictment,
conceived and prosecuted with illegal evidence."

CORRECTION